

Louisiana Law Review

Volume 36 | Number 4
Summer 1976

The Admissibility of Hearsay in Preliminary Examinations in Louisiana

Pete Lewis

Repository Citation

Pete Lewis, *The Admissibility of Hearsay in Preliminary Examinations in Louisiana*, 36 La. L. Rev. (1976)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol36/iss4/12>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

THE ADMISSIBILITY OF HEARSAY IN
PRELIMINARY EXAMINATIONS IN LOUISIANA

The Louisiana Code of Criminal Procedure provides a criminal defendant with the right to a preliminary examination in felony cases if no grand jury indictment has been returned.¹ Traditionally, hearsay and other informal modes of proof were inadmissible at a preliminary examination;² however, recently the Louisiana Supreme Court denied writs in a case in which the trial judge based a finding of probable cause in a preliminary examination solely on hearsay and other normally inadmissible statements.³ The court's refusal to consider the case raises the question of whether hearsay and other informal modes of proof are now admissible at a preliminary examination.

Prior to the 1974 Louisiana constitution, article 292 of the Louisiana Code of Criminal Procedure gave a criminal defendant the right to a preliminary examination in felony cases "before the finding of an indictment or the filing of an information. . . ."⁴ Article I, § 14, of the new constitution not only guarantees this right but also impliedly modifies article 292 by eliminating the district attorney's power to circumvent a defendant's right by simply filing a bill of information.⁵ Unless a grand jury has indicted him, the defendant is entitled to a preliminary examination. The transcripts of the Constitutional Convention debates reveal that this protective limitation was the only intended change from prior law.⁶

1. LA. CODE CRIM. P. art. 292.

2. The writer's research revealed no cases in which the Louisiana Supreme Court stated that the hearsay rule was inapplicable to preliminary examinations. See also *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544 (1976).

3. *State v. Perkins*, 316 So. 2d 385 (La. 1975). The accused's prior criminal record was introduced without the defendant ever taking the stand. Also reference was made by the state to normally inadmissible polygraph evidence.

4. LA. CODE CRIM. P. art. 292 prior to its amendment by La. Acts 1974, Ex. Sess. No. 16, § 1.

5. LA. CONST. art. I, § 14: "The right to a preliminary examination shall not be denied in felony cases except when the accused is indicted by a grand jury."

6. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Sept. 14, 1973 at 20-31 [hereinafter cited as PROCEEDINGS]. *Id.* at 27, where Mr. Burson remarked: "After the finding of an indictment or the

Therefore, the type of preliminary examination provided in the Louisiana Code of Criminal Procedure, and the evidentiary rules applicable thereto, were unaltered by the new constitution.

The Louisiana Code of Criminal Procedure provides for a "full-blown" preliminary examination,⁷ the purpose of which is to determine if probable cause exists to hold the defendant, to determine if the defendant is entitled to bail and in what amount, and finally, to perpetuate testimony.⁸ The defendant is entitled to counsel,⁹ has the right to have the witnesses produced against him examined in his presence, and has the right to confront and to cross-examine the witnesses produced against him.¹⁰ Furthermore, the Code provides that a transcript of the testimony be made and perpetuated for possible use in a subsequent judicial proceeding.¹¹

The extensive adversarial proceeding formulated in the Code of Criminal Procedure does not contemplate the admis-

filing of an information, *Article 292 of the Louisiana Code of Criminal Procedure* says that, 'an order for a preliminary examination in felony cases may be granted by the court at any time either on its own motion or on request of the state or of the defendant.' The intent of this amendment is not designed, and I want to make the record clear on that point, to add to or subtract from the right to a preliminary examination in any case but one, and that would be the case where the district attorney has elected to go by route of filing a Bill of Information" (emphasis added). Obviously the redactors recognized that they were working with the present statutory guidelines in LA. CODE CRIM. P. arts. 291-98. Additionally, at the time of the convention the redactors had before them *Pugh v. Rainwater*, in which the Fifth Circuit Court of Appeals held unconstitutional a discretionary system in which the district attorney could file an information and obviate the necessity of having a preliminary examination, 483 F.2d 778 (5th Cir. 1974). See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544-46 (1976).

7. LA. CODE CRIM. P. arts. 293-95 gives the criminal defendant extensive rights in this proceeding. See also Comment, *The Constitutional Right to a Preliminary Hearing in Louisiana*, 35 LA. L. REV. 813, 814 (1975).

8. LA. CODE CRIM. P. art. 296.

9. *Id.* art. 293.

10. *Id.* art. 294, comment (a) indicates that the redactors felt, based on the early Louisiana Supreme Court decision of *State v. Chambers*, 44 La. Ann. 603, 10 So. 886 (1892), that the constitutionally guaranteed right of confrontation was applicable in preliminary examinations. Of course at the time the Code of Criminal Procedure was enacted in 1966 the right of confrontation was guaranteed by La. Const. art. I, § 9 (1921). LA. CONST. art. I, § 16 did not alter this concept. See PROCEEDINGS, Sept. 7 at 94-115.

11. LA. CODE CRIM. P. art. 294.

sibility of hearsay.¹² Although the Louisiana jurisprudence clearly evidences many exceptions to the general prohibition against hearsay,¹³ none of the cases intimate that the hearsay rule itself is inapplicable in preliminary examinations. Moreover, the right of confrontation traditionally has mandated that hearsay is not admissible against a criminal defendant.¹⁴ For example, in a series of cases beginning with *Pointer v. Texas*¹⁵ the United States Supreme Court has recognized that the right of confrontation and the general prohibition against hearsay protect similar values.¹⁶ The major

12. LA. R.S. 15:434 (1950) provides: "Hearsay evidence is inadmissible, except as otherwise provided in this Code." The right of confrontation and social policy also weigh heavily against the admissibility of hearsay at the preliminary examination. For other jurisdictions that utilize formal evidentiary rules at the preliminary exam, see ARIZ. REV. STAT. 22-211 (1956); CAL. EVID. CODE 300 (1966); *People v. Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *People v. Weiss*, 147 Misc. 595, 261 N.Y.S. 646 (Magis. Ct. 1932); *Wolke v. Fleming*, 24 Wis. 2d 606, 129 N.W.2d 841 (1964). See also *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544 (1976).

13. *E.g.*, *State v. Guin*, 212 La. 475, 30 So. 2d 895 (1947) (admissions); *State v. Kelly*, 237 La. 956, 112 So. 2d 674 (1959) (business records); *Campbell v. American Home Assur. Co.*, 260 La. 1047, 258 So. 2d 81 (1972) (declarations against interest); *State v. Banks*, 111 La. 22, 35 So. 370 (1903) (reported testimony); *State v. Black*, 42 La. Ann. 861, 8 So. 594, (1890) (dying declarations); *State v. Smith*, 285 So. 2d 240 (La. 1973) (excited utterances and present sense impressions as part of the *res gestae*). See generally G. PUGH, LOUISIANA EVIDENCE LAW 387-527 (1974).

14. Comment, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965). "'Confront' connotes a more active participation by the defendant with the witnesses and thus can reasonably be read as including an opportunity to cross-examine. 'Witnesses' similarly must mean the declarants, rather than any witnesses who recount what the declarants or original documents said. If the sixth amendment were construed not to require the production of the declarant of the damaging statement, the accused's right of cross-examination would then be emasculated." *Id.* at 743.

15. 380 U.S. 400 (1965).

16. See *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965). In addition to these cases several other decisions recognize that hearsay problems are to an extent constitutional problems. See *Harrington v. California*, 395 U.S. 250 (1969); *Berger v. California*, 393 U.S. 314 (1968); *Roberts v. Russell*, 392 U.S. 293 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Parker v. Gladden*, 385 U.S. 363 (1966); *Brookhart v. Janis*, 384 U.S. 1 (1965). See also *Smith v. Illinois*, 390 U.S. 129 (1968); *Burgett v. Texas*, 389 U.S. 109 (1967). However, since 1970, the United Supreme Court has stated that there is not perfect congruence be-

reason for the existence of the right of confrontation, as the Court viewed it, is to give the defendant the right to cross-examine the witnesses against him, unless one of the recognized hearsay exceptions applied.¹⁷ The Louisiana courts have generally followed this trend and have prohibited the use of hearsay against a criminal defendant unless the evidence falls into one of the recognized hearsay exceptions.¹⁸

From a policy standpoint, hearsay should be inadmissible at a preliminary examination. The basic objection to hearsay evidence is its potential unreliability,¹⁹ and because of this, the binding over for trial of an accused on hearsay evidence alone seems unfair and repugnant to our concepts of substantial justice.²⁰ If hearsay is used to establish probable cause at a preliminary examination, an accused may be deprived of his liberty for a substantial period of time based on potentially unreliable evidence;²¹ he will be subjected to the anxiety and hazardous uncertainty of a criminal trial; and finally, he will be put to considerable expense to defend himself.²² In addition to these immediate consequences, the accused's reputation will be harmed irreparably, even if he is subsequently acquitted. The only justification for admitting hearsay in a preliminary examination is society's significant interest in detaining one who is probably guilty. However, the disallowance of hearsay does not necessarily facilitate escape of the guilty since other evidence of guilt should be available, and even if it is not, the discharge from custody of a defendant after no finding of probable cause does not preclude the dis-

tween the hearsay and confrontation rules, although they do protect similar values. *Dutton v. Evans*, 400 U.S. 74, 80-86 (1970); *California v. Green*, 99 U.S. 149, 155-56 (1970).

17. See *Pointer v. Texas*, 380 U.S. 400 (1965).

18. *E.g.*, *State v. Washington*, 261 La. 808, 261 So. 2d 224 (1972); *State v. Holmes*, 258 La. 221, 245 So. 2d 707 (1971); *State v. Wright*, 254 La. 521, 225 So. 2d 201 (1969).

19. See C. MCCORMICK, EVIDENCE § 245 at 581 (1972).

20. *Cf.*, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). In the context of a disloyalty trial, Justice Douglas, concurring, indicated that courts should be very careful to insure the defendant a fair trial before eliminating the public trust and confidence in him by pronouncing his disloyalty. *Id.* at 180.

21. *E.g.*, *White v. Maryland*, 373 U.S. 59 (1963).

22. Additionally, it is to the state's financial advantage to see to it that unsubstantiated charges are not prolonged indefinitely.

trict attorney from rearresting the accused when additional, competent evidence is available.²³ The prohibition against hearsay at a preliminary examination furthers reliability and has a desirable social effect in a society committed to the ideal that only the guilty should be imprisoned.

How then should Louisiana courts handle the following situation? A police officer takes the stand at a preliminary examination and relates hearsay and "double hearsay"²⁴ in order to establish probable cause to hold the accused for the charge involved. The state produces no competent evidence of the defendant's guilt. In such a situation hearsay testimony should be inadmissible, and unless other competent evidence is presented, the accused should be discharged pursuant to Code of Criminal Procedure article 296.²⁵ Yet in an identical factual situation the trial court in the recent case of *State v. Perkins*²⁶ reached an opposite result and not only allowed hearsay into evidence, but acknowledged that it was "plowing new ground today"²⁷ in admitting hearsay evidence at a preliminary examination.²⁸ The defendant applied to the Louisiana Supreme Court for supervisory writs of review, but the court denied writs.²⁹

Perhaps this questionable writ-denial can be understood by an examination of the recent decision of *Gerstein v. Pugh*,³⁰ in which the United States Supreme Court held that the fourth amendment entitles a criminal defendant to a judicial determination of probable cause, irrespective of the of-

23. See LA. CODE CRIM. P. art. 296, comment (c). However, since the 1974 constitution, unless probable cause is established against the defendant at a preliminary examination, he cannot be brought to trial unless indicted by a grand jury. See LA. CONST. art. I, § 14; LA. CODE CRIM. P. art. 296.

24. Double hearsay simply means that the witness stated (for the truth of the matter asserted) not simply what another has related to him, but what was related to another via a third party and then related to the witness by the intermediary party. For example, an officer on the stand gives testimony (asserted for the truth of the matter) concerning information obtained from Mr. X, who stated he obtained his information from Mr. Y.

25. LA. CODE CRIM. P. art. 296.

26. *State v. Perkins*, Crim. No. 55, 941 (19th Jud. Dist., filed March 14, 1975).

27. *State v. Perkins*, 316 So. 2d 385, 388 (La. 1975) (Barham, J., dissenting). The trial court record is appended to the opinion at 388.

28. *Id.*

29. *State v. Perkins*, 316 So. 2d 385 (La. 1975).

30. 420 U.S. 103 (1975).

fense charged, as a prerequisite to continued detention when no arrest warrant has been obtained.³¹ The Court in *Gerstein* made it clear that it did not consider this "first appearance" hearing a "critical stage"³² of the prosecution, but rather likened the determination of probable cause to obtaining an arrest warrant.³³ Consequently, the court stated that constitutionally, the proceeding need not even be of an adversary nature and moreover, that informal modes of proof such as written testimony and hearsay could be admissible.³⁴

Although Louisiana once provided statutorily for such a "first appearance" hearing, in the 1928 Code of Criminal Procedure,³⁵ it had fallen into such disuse that the redactors of the 1966 Louisiana Code of Criminal Procedure discontinued it and substituted in its place a booking procedure.³⁶ In *Gerstein*, the Supreme Court stated that such a booking procedure does not meet the requirements of the fourth amendment, which requires a "first appearance" hearing as a prerequisite to any further restraint of the criminal defendant's liberty when no arrest warrant has been obtained.³⁷ Under the precise circumstances of *Gerstein*, a criminal defendant has a

31. *Id.* at 126.

32. "Critical stage" is the label the Supreme Court attaches to any pre-trial procedure in which a defense on the merits would be impaired if the accused were required to proceed without counsel. See *Coleman v. Alabama*, 399 U.S. 1 (1970); *United States v. Wade*, 388 U.S. 218, 226-27 (1967).

33. 420 U.S. at 120.

34. *Id.* at 122. The Court intimated that the proceeding could even be ex parte. *Id.* However, LA. CONST. Art. I, § 13 provides that the accused is entitled to counsel at each stage of the proceedings against him, which indicates that in Louisiana the accused's rights at a *Gerstein* type hearing are broader than required by the fourth amendment.

35. LA. CODE CRIM. P. arts. 79-82 (1928). Similar to the *Gerstein* hearing, the criminal defendant arrested without a warrant was to be brought before the judge without unnecessary delay and, "unless an affidavit be then made setting forth the charge against the prisoner," the judge was to "order him forthwith to be discharged from custody." *Id.* art. 81.

36. LA. CODE CRIM. P. arts. 228-29 provide that once a person is arrested, he should be taken promptly to the nearest jail or police station, where he is to be booked. The booking officer must inform the prisoner of the charge against him, and of his rights to counsel and to a preliminary examination. In 1972, the legislature added article 230.1 (La. Acts 1972, No. 700, § 1), which provides that a criminal defendant must be brought before a judge within 144 hours from the time he is taken into custody for the appointment of counsel and, at the judge's discretion, consideration of bail. However, there is no probable cause determination at this stage or at the booking stage.

37. 420 U.S. at 126.

federal constitutional right to a hearing irrespective of whether a state provides one by statute.

In effect, what the trial court did in *Perskins* was to hold a preliminary examination "a la *Gerstein*," even though the Code of Criminal Procedure, recently constitutionally reaffirmed,³⁸ provides for a more extensive adversarial proceeding "of right."³⁹ Whether the two proceedings can be combined effectively and whether to do so is constitutionally proper, is questionable.⁴⁰ The two procedures simply are not coextensive. The *Gerstein* "first appearance" hearing is "of right" irrespective of the offense charged;⁴¹ in Louisiana the right to a preliminary examination exists only in felony cases.⁴² The *Gerstein* hearing is a constitutional prerequisite to continued detention;⁴³ in Louisiana continued detention is immaterial to a defendant's right to a preliminary examination.⁴⁴ The right to a *Gerstein* hearing exists only absent an arrest warrant;⁴⁵ presence of an arrest warrant is immaterial with respect to the defendant's right to a preliminary examination in Louisiana.⁴⁶ Whether a defendant has been indicted by a grand jury is immaterial with respect to the *Gerstein* type hearing;⁴⁷ in Louisiana the defendant does not have the right to a preliminary examination if he has been indicted by a grand jury.⁴⁸ Moreover, the court in *Gerstein* made it clear that to implement effectively the accused's fourth amendment rights, the hearing must be held promptly after arrest;⁴⁹ contrariwise, the Louisiana procedure fixes no time limit since its purpose is not directed toward a prerequisite to continued detention.⁵⁰

38. LA. CONST. art. I, § 14; PROCEEDINGS, Sept. 14 at 20-31.

39. LA. CODE CRIM. P. arts. 291-96.

40. When Article I, § 14 was approved, the redactors of the 1974 Louisiana constitution had in mind only the proceeding established by arts. 291-98; PROCEEDINGS, Sept. 14 at 20-31. Furthermore, the *Gerstein* decision had not yet been handed down. Therefore, it would be improper to simply substitute the "first appearance" hearing for the one presently provided in the Code of Criminal Procedure.

41. 420 U.S. at 126.

42. LA. CONST. art. I, § 14; LA. CODE CRIM. P. art. 292.

43. 420 U.S. at 126.

44. LA. CONST. art. I, § 14; LA. CODE CRIM. P. art. 292.

45. 420 U.S. at 126.

46. LA. CONST. art. I, § 14; LA. CODE CRIM. P. art. 292.

47. 420 U.S. at 126.

48. LA. CONST. art. I, § 14; LA. CODE CRIM. P. art. 292.

49. 420 U.S. at 125.

50. The extensive adversarial hearing provided for in Louisiana could

The state legislature certainly has authority to provide for a "first appearance" hearing to supplement the present procedure outlined in the Code of Criminal Procedure.⁵¹ However, until such action is taken by the legislature, Louisiana courts should enforce the present statutory scheme, recently constitutionally reaffirmed.⁵² Since a writ denial is not a ruling on the matter, when the issue is again presented, hopefully the Louisiana Supreme Court will clarify a criminal defendant's rights by recognizing that only competent evidence should be admissible at a preliminary examination in Louisiana.

Pete Lewis

THE ATTORNEY AND CONTEMPT: HOW CAN HE ADVISE HIS CLIENT?

In *Maness v. Meyers*,¹ the United States Supreme Court confronted the question of whether an attorney can, without risking a contempt citation, advise his client to disobey a court's order to produce evidence, when the attorney's advice is based on his good faith belief that the client is protected by the fifth amendment from disclosure of that evidence. The attorney's client had been served, during a civil trial,² with a

not except in rare instances be held soon enough to satisfy the promptness required by *Gerstein*, due to the need to allow the defendant time to procure counsel and time to prepare for the hearing. The court in *Gerstein* recognized that the more extensive the procedure was, the more difficult it would be to comply with the decision and suggested that some existing procedures would have to be accelerated and others modified. 420 U.S. at 120, 124.

51. At present the Louisiana State Law Institute has under study a proposal that would allow the finding of probable cause to be based in whole or in part on hearsay (proposed art. 299) with a corollary amendment to art. 295 that would permit a motion to strike prior recorded hearsay testimony when the transcript is to be introduced at trial. This would be an attempt to legislatively effectuate our present statutory scheme into a *Gerstein* type hearing; however, it would constitute a major departure from the redactors' intended meaning of LA. CONST. art. I, § 14, and would not solve the problems in trying to combine the two proceedings.

52. See authorities in note 38, *supra*.

1. 419 U.S. 449 (1975).

2. Although the trial was referred to as a civil one, the proceeding was criminal in nature since it was initiated under Article 527 of the Texas Penal Code, which regulates the distribution of obscene materials. The article pro-